

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

October 10, 2008

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

HAWAII

Approve Nondisturbance and Attornment Agreement Between State of Hawaii
and Cyanotech Corporation, North Kona, Hawaii, Tax Map Key: (3) 7-3-43:63

APPLICANT:

Cyanotech Corporation

LEGAL REFERENCE:

Section 171-6 and 22, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Keahole, North Kona, Hawaii, identified by Tax Map Key: (3) 7-3-43:63, consisting of approximately 90.067 acres, as shown on the attached map labeled Exhibit A.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

BACKGROUND:

The Land Board at its meeting of April 26, 1996, under agenda Item D-14, approved the cancellation of Sublease K-2 and Facilities Use Agreement to Cyanotech Corporation, and consented to Sublease K-4 to Cyanotech Corporation under General Lease No. S-4717, issued to NELHA. The new sublease would commence on January 1, 1996 and expire on December 31, 2026, for a term of thirty (30) years. The sublease area covered approximately 90.067 acres. The sublease annual rental is \$9,360.00 per month or 2% of gross sales, whichever is greater.

The Land Board at its meeting of November 19, 1999, under agenda Item D-20, approved

as amended, the cancellation of General Lease No. S-4717 and S-5157; cancellation of Governor's Executive Order No. 3282; and the direct issuance of a new lease to the Natural Energy Laboratory of Hawaii Authority. The cancellation was effective July 2, 2001. The new lease (General Lease No. S-5619) commenced on July 3, 2001 and will expire on July 2, 2046. General Lease No. S-5619 authorized Sublessor to honor all existing or pending subleases that were current as to rent and all other terms and conditions of the subleases.

The Land Board at its meeting of May 23, 2008, under agenda Item D-8, consented to the \$1,078,400 mortgage from Bridgeview Capital Solutions and subordination of the first position lien interest of NELHA and the State of Hawaii, in and to Cyanotech's personal property, to Bridgeview Capital Solutions.

During the processing of the consent document, the Attorney General's office discovered the mortgage documents submitted by Cyanotech attorney referenced General Lease No. S-4717 and S-5157. Both were cancelled on July 2, 2001. We requested Cyanotech to revise the mortgage document in order for the State to process the consent. At the same time, Cyanotech requested that the Department process a nondisturbance and attornment document to correct past incorrect information recorded at the Bureau of Conveyances regarding the master lease.

ANALYSIS:

When staff processed the cancellation of General Lease No. S-4717 in 2001, the long-term subleases were overlooked. The main focus was the processing of thirty-eight (38) short-term subleases. There are 4 long-term subleases: Hawaiian Abalone Farms expires October 31, 2039, Cyanotech Corporation expires December 31, 2025, Royal Hawaii Sea Farms expires August 31, 2020 and Uwajima Fisheries, Inc. expires on December 31, 2023. This submittal will only cover Cyanotech Corporation, is unique to their specific circumstances, and will in no way set any precedent for any of the other subleases.

Apparently, the Original Lease (GL #4717) provision "In the event that a sublease shall have been entered into by Lessee and approved by Lessor and the Sublease is not in default, the Lessor shall recognize Sublessee and shall not disturb Sublessees, so long as Sublessee attorns to Lessor and abides by the terms of the sublease" was not included in the New Lease (GL #5619).

A non-disturbance and attornment provision or agreement is simply an exchange of promises whereby a master lessor (BLNR) agrees to recognize and not disturb a sublessee (Cyanotech), so long as rent is paid and all obligations are performed under the sublease and so long as the sublessee (Cyanotech) agrees to recognize and attorn to the master lessor (BLNR) as the sublessee's true lessor, if the master lessor (BLNR) terminates the master lease because of breach by the master lessee/sublessor (NELHA). As important as it is to the sublessee to remain a sublessee, it is a critical element in the security rights of the sublessee's Mortgagee (Bridgeview Capital Solutions) and sublessee's Guarantor.

NELHA, as sublessor has provided a Consent, Estoppel Certificate and Subordination Agreement to Lender (Bridgeview Capital Solutions).

Cyanotech has been a sublessee for over twelve years at Keahole. Has twice borrowed significant funds (\$3.5 million in 2000 and \$1,078,400 in 2008) to continue its business development in Keahole. BLNR has consented to two mortgages (in 2000 and 2008). Based on this unique situation, staff is recommending the Land Board acceptance of the Nondisturbance and Attornment Agreement hereby attached as Exhibit B.

Should any other sublessor seek the Department's approval and execution of nondisturbance and/or attornment agreements in the future, Staff recommends that the BLNR consider reinstating its authority to review and consent to all subleases issued by NELHA as a means to ensure that NELHA's subtenants are acceptable to the BLNR and Department.

RECOMMENDATION: That the Board:

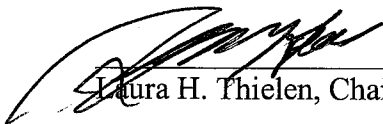
- A. Authorize entering into the Nondisturbance and Attornment Agreement between the State of Hawaii and Cyanotech Corporation, subject to the following:
 - 1. Review and approval by the Department of the Attorney General.
- B. Delegate to the Chairperson authority to approve and sign the necessary documents.
- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Charlene E. Unoki
Assistant Administrator

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson





LAND COURT SYSTEM

REGULAR SYSTEM

Return by Mail ☐ Pickup ☐ To:

Total Pages: _____

Tax Map Key No.: (3) 7-3-43-63

**NONDISTURBANCE
AND ATTORNMENT AGREEMENT**

THIS NONDISTRUBANCE AND ATTORNMENT AGREEMENT ("Agreement") is made as of _____, 2008, by and between the **STATE OF HAWAII**, by its Board of Land and Natural Resources ("**Lessor**") and **CYANOTECH CORPORATION**, a Nevada corporation, whose address is 73-4460 Queen Kaahumanu Highway, Kailua Kona, Hawaii 96740 ("**Sublessee**").

Recitals:

(a) Lessor and the Natural Energy Laboratory of Hawaii Authority, State of Hawaii ("**Sublessor**") entered into that certain unrecorded General Lease No. S-4717 effective as of November 1, 1978, and executed on March 9, 1984, a short form of which, dated April 21, 2000, was recorded in the Bureau of Conveyances of the State of Hawaii (the "**Bureau**") as Document No. 2000-056137, and that certain unrecorded General Lease No. S-5157, effective September 1, 1985, and executed on September 18, 1987, as amended on May 24, 1994 (the "**Prior Master Lease**").

(b) Sublessor and Sublessee entered into that certain unrecorded Sublease K-4, entered into on December 29, 1995, effective November 18, 1996, as amended by Supplemental Agreement No. 1 to Amend Sublease K-4, entered into on November 21, 1996 (the "**Sublease**"), a short form of which, dated April 21, 2000, was recorded in the Bureau as Document No. 2000-056138, covering approximately 90.067 acres of land, more or less, situated at North Kona, Island of Hawaii, State of Hawaii, being a portion of the land leased by Lessor to Sublessor under the Prior Master Lease (the "**Premises**").

(c) On November 19, 1999, Lessor and Lessee authorized the cancellation of General Lease No. S-4717 and the Prior Master Lease, effective as of July 2, 2001, and the consolidation of these leases under that certain unrecorded General Lease No. S-5619 effective as of July 3, 2001, and executed on July 13, 2001, as amended on December 11, 2006 (the "**New Master Lease**"), pertaining to a parcel of land situated at North Kona, Island of Hawaii, State of Hawaii.

(d) General Lease No. S-5619 authorized Sublessor to honor all existing or pending subleases that were current as to rent and all other terms and conditions of the subleases.

(e) In light of the foregoing history of changes in the terms of the Master Lease from General Lease No. S-4717 through to the New Master Lease, Sublessee and Bridgeview Capital Solutions, L.L.C. (its "**Mortgagee**"), agreed to amend their Real Property Mortgage; Security Agreement; Assignment of Rents; and Financing Statement (the "**Mortgage**") to reflect the replacement of General Lease No. S-4717 with the New Master Lease.

(f) In order to properly protect Mortgagee's interests under the Mortgage, as amended, Sublessee agreed, as a further condition of default under the Term Loan Agreement between Sublessee and its Mortgagee, to obtain a Non-Disturbance and Attornment Agreement from the Lessor on or before October 13, 2008.

Agreement:

NOW, THEREFORE, intending to be legally bound hereby, the Lessor and Sublessee agree as follows:

1. **Nondisturbance and Attornment.** In the event of revocation or termination of the New Master Lease and provided Sublessee is not in default under the Sublease, Lessor shall recognize Sublessee and shall not disturb Sublessee so long as Sublessee attorns to Lessor and abides by the terms of the Sublease.

2. **Miscellaneous.**

(a) This Agreement may not be modified orally or in any manner other than by an agreement in writing signed by the parties hereto or their respective successors and assigns.

(b) This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

(c) This Agreement may be executed in any number of counterparts and by different parties in separate counterparts, all of which taken together shall constitute one and the same document, binding upon all the parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the day and year first above written.

Approved by the Board of Land and
Natural Resources on _____,
2008.

APPROVED AS TO FORM

Deputy Attorney General
Dated: _____

STATE OF HAWAII

By _____
Chairperson and Member
Board of Land and Natural Resources

Lessor

CYANOTECH CORPORATION, a Nevada
corporation

By _____
Gerald R. Cysewski
Its Executive Vice President

By _____
William R. Maris
Its Secretary

Sublessee